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IN THE

Supreme Court of the United States

October Term, 1965.

No. 607.

FRANK J. ANDREWS,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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IN THE

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OCTOBER TERM, 1965.

No.

FRANK J. ANDREWS,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FRANK J. ANDREWS, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on June 17, 1965.

OPINION BELOW.

The opinion of the court below (Appendix B, *infra*, pp. 3A-18A) is reported at 347 F. 2d 207.

JURISDICTION.

The judgment of the court below (Appendix C, *infra*, p. 19A) was entered on June 17, 1965. A timely petition for rehearing was denied on August 30, 1965 (Appendix D, *infra*, p. 20A). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether, where newspaper accounts obviously prejudicial to the petitioner were published in the course of a trial lasting 18 court days that were followed by three and a half days of jury deliberation, it was proper for the trial judge to deny the request of petitioner's counsel, made in respect of each publication, that the members of the jury be examined on *voir dire* to ascertain whether they had seen the articles in question.

2. Whether the trial judge's charge was improperly coercive under the doctrine of *Jenkins v. United States,* 380 U. S. 445, particularly when it was repeated after the jury had already deliberated for three days.

3. Whether the instruction to the jury on reasonable doubt, wherein the trial court also stated "it is not an excuse not to make a verdict," was prejudicially erroneous.

4. Whether the entire charge to the jury on willfulness was prejudicially erroneous.

5. Whether it was prejudicial error for the trial court to permit the prosecuting attorney in the presence of the jury after the witness for the government had invoked his privilege against self-incrimination to ask questions which he knew the witness would refuse to answer on the grounds of self-incrimination.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The constitutional provisions and statutes involved are set forth in Appendix A, *infra,* pp. 1A-2A.

STATEMENT.

Petitioner Frank J. Andrews was named in a 35-count indictment together with eight other defendants. After a trial that consumed 18 court days, the jury deliberated for three and a half days more. Petitioner was then convicted on Count 1, the conspiracy count, while the jury disagreed as to him on Counts 2-33, the substantive counts in which he was also charged. He was sentenced to the maximum permitted by law, five years' confinement and a fine of $10,000, and that judgment was affirmed on appeal.

The statement that follows sets forth only such relevant facts as will sufficiently place in their setting the questions presented in the present petition.

A. The Indictment.

Count 1, the only one of which petitioner was convicted, charged a conspiracy by all of the defendants[1] to evade the excise tax on wagers (I. R. C. 1954, § 4401) and to file false returns in violation of I. R. C. 1954, §§ 7201, 7206(1) and 7206(2), said conspiracy being in violation of 18 U. S. C. § 371.

The only overt acts alleged against Frank Andrews were (No. 1) that on February 2, 1959, he executed a rental agreement with the defendants Daniel Andrews, Owens, and Whitley, and (No. 8) that on July 2, 1961, he entered the Sportsman's Club, 333 Central Avenue, Newport, Kentucky.

Counts 2-32 charged all defendants with the attempt to evade the wagering tax on the "business of accepting wagers and conducting a lottery for profit, commonly known as and called 'numbers'," in which it was alleged all the defendants were engaged, for each month from August 1961 through February 1959, by filing false returns therefor, in violation of § 7201 (I. R. C. 1954).

1. Defendant Daniel Andrews was severed because of illness.

Count 33 charged all defendants with causing two telephone companies to furnish telephones for an unlawful purpose, viz., to transmit numbers bets in violation of those companies' tariffs, in violation of 47 U. S. C. §§ 203(2) and 501.

Petitioner was not named in Counts 34 or 35.

B. The Evidence.

On February 2, 1959, petitioner leased the premises at 330 Central Avenue, Newport, Kentucky, to a partnership consisting of the defendants Daniel Andrews, Owens and Whitley, the lease (Govt. Ex. 128) providing (233a) [2] that "the partnership will procure and pay for and maintain all licenses and pay all taxes, state, federal, municipal or otherwise required for the conduct of any business which the business or any of the partners or servants or employees may conduct and operate in and on the buildings and premises hereby leased to them, including all real estate and personal property taxes."

The partnership openly conducted wagering operations on the premises, and the partners and most of their employees duly registered as required by the wagering tax provisions of the Internal Revenue Code (Govt. Ex. 1-121).

Inasmuch as the jury disagreed with respect to petitioner on the substantive counts naming him, the evidence adduced thereunder need not be stated.

The evidence relating to petitioner on the conspiracy count other than that he had leased the premises consisted of a showing that certain personal bills were paid by partnership checks (1429a-1544a), some checks which had been given to and were endorsed by the partnership were among deposits in petitioner's bank account (1133a-1161a) and on one occasion he had helped an individual to get a job with the partnership (589a-593a, 617a, 625a-627a, 632a-634a).

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2. The letter "a" refers to the petitioner's Appendix below, copies of which have been filed with the Clerk of this Court.

C. Vital Occurrences at the Trial.

1. *The Prejudicial Newspaper Publicity.*

On no less than nine occasions during the trial, counsel for petitioner brought to the attention of the court newspaper headlines and articles, alleged to be prejudicial, some of them referring to matters that had been excluded (354a, 483a, 654a, 1249a, 1390a, 1460a-1461a, 1995a-1996a, 2077a-2078a, 2136a-2137a, 2256a-2259a). In each instance counsel requested that the members of the jury be examined on *voir dire* to ascertain whether they had seen the articles in question, and in each instance the judge refused the request, saying on the first few of these occasions that he would not assume that the jurors would not heed his admonition not to read about the case in the newspapers (354a-356a, 483a-484a).

The jury was not locked up either during the trial or during the three nights that intervened from the beginning to the close of its deliberations.

The prejudicial newspaper publicity was as follows:

(a) On July 2, the trial court sustained an objection to the prosecution's showing that the numbers game on the 333 Central Avenue premises was rigged (290a-293a), the court saying, "It's highly inflammatory and just to show they are running a crooked game, if that's the only purpose for it, which has nothing to do with what they owe the Government on the tax" (293a).

Next morning, a headline on the front page of *The Cincinnati Enquirer,* Kentucky Edition, read, "U. S. Stopped From Showing Numbers Selection 'Rigged'" (Def. Ex. X).

(b) On Wednesday, July 4, the banner headline on *The Kentucky Post Times and Star* proclaimed "Gaming Club's 'Secrets' Bared" (Def. Ex. X-1). The trial judge

admitted (483a) that "it is a rather glaring headline," but again denied the motion to examine the jurors on *voir dire* because he would not "have the jury catechized every morning before we start court to see whether or not they have violated their oath and violated their obligations as jurors to observe the court's instructions, simply because the newspapers are writing up this case" (484a).

(c) On July 6, *The Cincinnati Enquirer*, Kentucky Edition, had on its front page a picture of Mary Jo Williams, who had testified at length on the preceding day (582a-635a), with the caption "Widow Terrified, Denies Andrews' Story" (Def. Ex. X-2). A renewed motion for a *voir dire* examination of the jury was denied for the reasons theretofore given (654a).

(d) The same paper's story on July 11 headed, "Andrews' Huge Deposits Shown," was the subject of another motion for *voir dire* examination, which was denied (1249a).

(e) A similar motion was made and denied on the following day (1390a) in respect of the July 11 edition of the *Kentucky Post and Times Star* (Def. Ex. X-3-0), which had first page headlines reading "Say Checks For Andrews On Numbers. Deposited to Personal Account, Witness Testifies."

(f) Later on the same day an identical motion was made and denied (1460a-1461a) in connection with the same paper's issue of July 12 (Def. Ex. X-3), the first page of which had a story headed "Aide Links Andrews With Club" that continued at length on p. 22.

(g) Petitioner's motion for similar questioning of the jury was again denied a few days later (1995a-1996a); on that occasion the basis for the motion was a headline in *The Kentucky Post and Times Star* of July 17 reading "Unwilling Witness Tells of Phone Call" (Def. Ex. X-5), and one in the July 18 issue reading, "Government Near End in Racket Case" (Def. Ex. X-6). When counsel was

asked by the court whether he was able to represent that the jurors had in fact violated the court's admonitions, he replied (1996a), "No, I do not know that. It would only be determined after we inquired on *voir dire.*"

(h) On the following day, counsel complained of a *Cincinnati Enquirer* headline reading "U. S. Plays Trump Card in Andrews Tax Evasion Trial" (Def. Ex. X-7), saying (2077a), "* * * we suggest to the Court no one heard of this language before in the courtroom, that it is a news editorial and prejudicial to these defendants, and for those reasons we move to inquire as to whether the jurors have read this paper, heard any similar radio news account or telecast account." Once more the motion was overruled (2078a).

(i) Later on the same day, a further motion for examination of the jurors was made in respect to a *Kentucky Post* headline dated July 19, with a banner first page headline reading "Recess Seen in Numbers Trial" (Def. Ex. X-9), the text of which set forth petitioner's contention that he was only a landlord after asserting that some of the papers seized by raiding Internal Revenue agents were identified by a handwriting expert as bearing his name (2136a-2137a): "If any of the jurors have read that, we believe that misstatement by the paper would be highly prejudicial to the rights of my defendant." Once more, "for the same reasons," motion overruled (2137a).

2. *The Charge as to Hung Juries and the Duty of a Jury to Reach Agreement.*

The judge's charge in chief extends to 55 pages of the transcript (2178a-2224a). On the second page he said:

> "We have in this country I am afraid all too frequently what is known as hung juries, when the jurors are unable to agree. While, of course, the purpose of the jury trial is that it would be tried by men of vary-

ing degrees of experience and yet they are men who are supposedly capable of making up their minds on a given set of facts. All too frequently we have, I say, what is known as a hung jury which is no credit to the individual juror or to the jury itself or to the system or to the Court. I suppose that if there would be enough hung juries we would probably abolish the jury system for there has to be something to be progressive in the administration of justice and not a stumbling block." (2179a)

In the course of defining reasonable doubt, he charged:

"The term *reasonable doubt,* as used in this instruction, is best defined by a use of the term itself. Don't be confused by reasonable doubt. It is not an excuse not to make a verdict. It is not a shield to hide behind to keep from carrying out your responsibility as a juror" (2184a).

The judge further charged (2185a-2187a):

"But before you make up your mind, gentlemen, you should give due regard and consideration to the reasoning and recollection and understanding of your fellow jurors. I am confident that every man on that jury, possibly none of you have ever known each other before you served together on this jury, but let me assure you that each man on that jury is just as anxious to do the right and proper thing in this case as you are. And before you make up your verdict, and I firmly believe that, before you make up your verdict or make up your mind what the verdict should be, you should give due regard to the reasoning and recollection, arguments, of your fellow jurors.

"A reasonable man is an awfully good kind of a citizen. I know there are those who have won fame by being stubborn and hardheaded. Somehow or other, I think the man that really keeps things going in this

world is the reasonable man, the man who is willing to give and take, who is willing to accede that the other fellow's views might, after all, not be entirely nonsensical.

* * *

"I have never served on a jury, but I have known a lot of people who have and I have been told that you go to a jury room and some one or two or more of the jurors immediately announce what the verdict will be and that they will stay there all day or all night or some other such extravagant statement, mistaking I am afraid hardheadedness and stubbornness with strong-mindedness. Well, such a person is not a good juror, not a good citizen, because he doesn't understand the meaning of an oath. Your oath carries through on that as it does on other things. So I ask you when you go to your jury room to see if you can make up your mind and make a verdict in this case. If you can't, you can't and I wouldn't undertake to require you to make a verdict. I couldn't if I wanted to and I wouldn't if I could. That is your free prerogative, but I do want you to understand that it is a responsibility which should not be lightly shirked. It is very easy to get into the jury room and not too concerned, 'Oh, well, let's let some other jury decide it. We just won't make any verdict.' I hope you won't take that attitude and I have every confidence that you won't."

This was on the morning of July 25, a Wednesday.

On the afternoon of Saturday, July 28, the Court of its own motion told the jury (2262a-2263a):

"The case was finally submitted to you, as I recall, about 1:00 o'clock on Wednesday and here it is Saturday afternoon and the case does not, could not, it would seem to me, require nearly that much time to decide. I don't know whether you are assuming a responsibility that makes you feel you have to examine each bit of evidence by way of exhibit, in other words,

whether you can't see the woods for the trees. This case has covered—this is the end of five weeks trial and we had four weeks of testimony and two days, I might say, of argument. It would be practically impossible to expect the jury to take up every conceivable bit of evidence by way of exhibit that has been offered in this case, but to look at the whole case, examine the whole thing as a whole as I tried to outline to you, draw what reasonable inferences may be drawn from the case. The exhibits are a part of the evidence, an important part of the evidence, but they are not all of the evidence. And I am going to ask you to resume your deliberations, taking into consideration that many of these counts in this indictment are very similar. It would seem that if a person were guilty or not guilty of one, the same thing would apply to many of the others. You have eight defendants here."

The next to last sentence quoted was objected to, without avail (2264a-2265a).

3. *The Charge on Reasonable Doubt.*

In addition to, and immediately following the reference to reasonable doubt previously quoted (*supra*, p. 8) the district court instructed the jury:

"But I think as common sense men of everyday affairs, you do understand the difference between what is reasonable and what is unreasonable, and so this term reasonable doubt means just what it says. It is a doubt based upon reason, not some inconsequential doubt that might flit through the mind of a juror, not some slight mental hesitation that might guide you in determining the less significant affairs of everyday life; but a doubt for which there is a reason, such a doubt as would guide you in determining the course of action in the conduct of your ordinary everyday living; a doubt based upon reason, not some shadowy, inconsequential misgiving." (2184a)

4. *The Charge on Intent.*

In his charge, the trial judge told the jury (2180a) that "this is a tax evasion case," and a little later said (2182a):

> "Your question is simple and narrow: Did they pay the taxes due under the law? * * * Your business is this: Did they pay the taxes under the law?"

Despite appellant's Request for Charge No. 6 (2163a-2164a), the district court instructed the jury as follows:

> "You will notice when I refer to this indictment a little later that it charges that these defendants did 'willfully and knowingly' do certain things. 'Willfully, and knowingly' implies what went on in their minds. This is offense which requires a criminal intent and therefore you must find, before you can find these defendants or any of them guilty, that they intended, that they committed a violation of the law intentionally. The question of intent is always somewhat confusing unless we look at it rationally and rationalize about it. So far, science has never reached the place where you can take some sort of an instrument and look into a man's head or into his brain and see what he is thinking. That is not visible; thought, after all, is not a substance, it is not a mass. The brain is a mass, but the thought is not. What you may intend to do is not reflected in any of your physical parts or what you are thinking is not reflected in any of your physical parts. And so the law is bound then to accept the next best text and that is that a person is presumed to intend the natural consequences of his own deliberate acts. And you have to judge what is in his mind by what he does and the reasonable inferences which may be drawn from it. The United States is not required to produce someone here to establish beyond a reasonable doubt just what these defendants had in their minds at all stages of this alleged offense, but it shows by evidence

and introduces witnesses and examines these witnesses in your presence and for your benefit and subject to cross-examination by the defendants, to bring out the facts and then you, from those facts, are to determine whether or not these defendants or any of them or all of them intended to defeat the tax collector in his efforts to receive from them the amount of taxes which the United States says were due. So, you are not to be confused by that thing intent. That, again, is not something to hide behind to keep from making a verdict. You reach that fact as you would any other fact. A person intends, under the law the natural consequences of his own deliberate acts and you have a right to determine that question of intent by the whole evidence in the case and by the actions and conduct of the defendants." (2190a-2192a)

Objection was specifically made that the charge did not include willfulness as an essential element as follows:

"In the first portion of your charge to the jury, you made the statement that the issue is narrow and simple, it is a tax evasion case and a few moments later you said the question is, did they pay the taxes due under the law, and while Your Honor did charge the jury that it must be knowingly, willfully and unlawfully, I believe that Your Honor gave undue emphasis to the fact that the only question is did they pay taxes due under the law. I think also of equal importance and maybe of greater importance is the fact that did they do it unlawfully, willfully and knowingly, and I ask the Court to perhaps correct to the jury the misapprehension that the only question offered is, did they pay taxes due under the law." (2229a-2230a)

This objection was overruled (2230a).

On the morning of Friday July 27, after a day and a half of deliberation, the jury asked for further instructions on the conspiracy charge, count 1 (2245a).

Following some three pages of explanation (2245a-2248a), counsel for this appellant requested clarification—"you said the mere fact that he knew that there was an illegal operation there would make him guilty" (2249a)—the Court further charged as follows:

> "Bear in mind, as I have emphasized, the day before yesterday in my charge, the charge here is the withholding of this excise tax, that is the offense charged, and the knowledge which is set forth in the charge is knowledge that the tax purposes were being defeated and that the government was being defrauded of its taxes. That is the charge contained in the indictment. *As I told you, it is a narrow proposition. Did they account for the tax or did they not,* and if they didn't, who was responsible or who participated in it under the general rule I have given you, under the law of conspiracy." (2250a-2251a, emphasis supplied.)

Again there was objection and again it was overruled; the colloquy was in these terms (2252a):

> "Mr. Weintraub: Your Honor again said to the jury, just a moment ago, that the issue is narrowed down to one thing, did they pay the taxes. Now, I think in view of that statement, you ought to tell them that it is not only that, but did they wilfully fail to pay, because when you tell the jury that the only question is—it is not only did they fail to pay the taxes——
>
> The Court: I think I have covered that all sufficiently.
>
> Mr. Weintraub: Well, I think you leave them with the issue is, did they fail to pay the taxes. It isn't only that but did they wilfully and deliberately fail to do it.
>
> The Court: Overruled. I have covered that repeatedly."

5. *Questions Concerning Prior Grand Jury Testimony Put to Witness Who Had Invoked Privilege Against Self-Incrimination.*

A witness, James Harris (1648a-1666a) testified to a conversation with this petitioner in June or July 1959 in which the latter inquired whether Harris would be interested in the Copa Club at 333 Central Avenue (1649a-1651a). Harris testified that there was no reference in that conversation to the numbers business at the Copa Club (1653a). Thereupon, in response to further questions, he admitted having testified before the grand jury (1653a, 1656a). He was then read an answer purportedly given by him before that body (1656a), in which he quoted the appellant as saying, *inter alia,* "I don't need the Copa Club, I got the numbers going for me," and also "he said there was no numbers involved, so all I want you to do is to book the shows and operate the club and so forth."

Motion for a mistrial was made and overruled (1656a-1657a), and in a colloquy, the defense's request for the grand jury minutes from which the prosecution was reading was denied (1657a-1661a).

Following an admonition by the court that the prosecution's question was not to be considered as any evidence against the defendants (1662a), the witness' previous grand jury answer was again read to him; he claimed the privilege against self-incrimination (1663a, 1665a). Objection to another question based on a grand jury answer was sustained because non-contradictory (1663a-1664a). The prosecution recurred to a further grand jury answer that had this petitioner saying to the witness that if the witness "would go back to the bottoms they would put together this numbers racket and consolidate it into one racket," again there was objection, again the witness invoked privilege, and again a motion for mistrial was made and overruled, the court simply repeating the admonition that the questions were not evidence against the defendants (1664a-1665a).

Once more the witness was read one of his grand jury answers concerning his suggesting the name of one Holtzman to this petitioner to take over the Copa Club, "so I called Mr. Holtzman and he talked to Mr. Andrews and it was only a matter of a few days until Mr. Holtzman was working, running the club for Mr. Andrews;" objection was sustained, and a motion for mistrial was denied (1665a-1666a).

D. The Opinion Below.

On appeal, the court below affirmed, largely in reliance, so far as the question of adverse newspaper publicity was concerned, on its own recent decision in *Sheppard v. Maxwell,* 346 F. 2d 707, pending on petition for certiorari, No. 490, this Term. It relied on the fact that the present case was less flagrant than that one; that here there had been no motion for change of venue; and that the case was factually different from its own earlier decisions in *Briggs v. United States,* 221 F. 2d 636; *Marson v. United States,* 203 F. 2d 904; and *Stone v. United States,* 113 F. 2d 70.

It criticized the trial judge's charge, saying (*infra,* Appendix B, p. 11A):

> "Referring to reasonable doubt he said: 'It is not an excuse not to make a verdict. It is not a shield to hide behind to keep from carrying out your responsibility as a juror.' We do not believe that this language is desirable. While it may be argued that this simply tells the jury that it is not any captious doubt which should cause them to withhold a verdict if otherwise convinced, it seems to us to place the Court in the position of urging a verdict with more emphasis than is appropriate."

But, taking the charge as a whole, the court below concluded that petitioner was not prejudiced.

As to the other issues that were presented by petitioner the court found no reversible error citing Rule 52(a) Fed. R. Crim. P.; 28 U. S. C. § 2111.

REASONS FOR GRANTING THE WRIT.

First. The ruling sought to be reviewed represents, so far as we are aware, the first decision by a Federal appellate court holding that, after plainly prejudicial newspaper articles concerning the trial that appear during the trial are called to the trial judge's attention, he may refuse requests to question the jury whether they have seen the articles, simply because the jurors had previously been admonished, in generalized terms, not to read any newspapers. Such a holding turns the presumption that jurors will heed the instructions given them into one that is conclusive, i.e., into a rule of law. But every other circuit that has ever considered the question, including the court below in earlier cases, has held that the rule is precisely to the contrary.

1. By way of preliminary, we note that the trial judge never once undertook to rule that the newspaper accounts would not have been prejudicial if all of the jurors had read them.

No such ruling, very plainly, would have been justified by this record. For here the newspaper headlines set forth matters that the court had advisedly withheld from the jury, viz., "U. S. Stopped From Showing Numbers Selection 'Rigged' " (Def. Ex. X), this after the trial judge had declared such evidence "highly inflammatory" (293a). The same article characterized petitioner as "master controller" of a gigantic numbers operation out of Newport after the trial judge had ordered the jury not to consider an answer, given in response to a leading question, that the witness had heard several people call petitioner the "Big Man" or the "Boss" (609a-610a). In another instance, the offending publicity was expressed in terms that exuded prejudgment of guilt, viz., "King of the Numbers Racket" (354a). Indeed, as the trial judge himself recognized (483a), some of the headlines were "glaring."

It is therefore no answer to say that the publicity in the Dr. Sam Sheppard case was a more shocking instance of journalistic incursions on the basic right to a fair trial; that case, whatever its ultimate outcome—as noted, it is now pending here as No. 490—is wholly different in two respects. First, it was a collateral attack on a State court judgment ten years later, not direct review of an original Federal conviction as here; second, even in the *Sheppard* case, the trial judge did question the jurors whether they had heard a particularly offensive broadcast. 346 F. 2d at 751.

2. The real vice here is that the trial judge refused to make the inquiry that the court below had earlier held was required (*Marson v. United States,* 203 F. 2d 904, 911): "Upon the showing of appellant's counsel, it was the duty of the court to interrogate the members of the jury to ascertain whether they had seen the newspaper articles and, if so, whether it had created any prejudice in their minds."

Other circuits, without exception, have uniformly enforced the duty of making inquiry on request.

Representative decisions include *Coppedge v. United States,* 272 F. 2d 504 (C. A. D. C.), where the court held inadequate a very generalized inquiry; *United States v. Bentvena,* 319 F. 2d 916, 934 (C. A. 2), where a juror who was shown the offending account by his wife but refused to discuss it with her was none the less discharged from the jury; *United States v. Vita,* 294 F. 2d 524 (C. A. 2), certiorari denied, 369 U. S. 823, where a juror who admitted reading the prejudicial article was excused and an alternate substituted; *United States v. Carlucci,* 288 F. 2d 691, 694-695 (C. A. 3), certiorari denied, 366 U. S. 961, where the judge "meticulously questioned" every juror; *United States v. Milanovich,* 303 F. 2d 626, 629-630 (C. A. 4), certiorari denied, 371 U. S. 876, where the court of appeals emphasized the duty of the trial judge to determine whether

the prejudicial matter had reached any juror; and *Accardo v. United States,* 298 F. 2d 133, 136 (C. A. 7), where the court said that the district judge "should have, by the careful examination of each juror, out of the presence of the others, determined the effect of the articles on those who had read them and whether they had discussed the articles with others." In that case, the Seventh Circuit said, in language fully applicable here, that (298 F. 2d at 136) "The judge's general admonitions at the beginning of the jury selection, his assumption of their effectiveness, and his instructions, were inadequate protection."[3]

Estes v. United States, 335 F. 2d 609, certiorari denied, 379 U. S. 964, cited—and apparently relied on—by the court below, was wholly different; there no request for inquiries directed to the jurors was made until after the close of the evidence. Here, to the contrary, such a request was made on each occasion that the prejudicial material appeared.

Except for the ruling now sought to be reviewed, we know of no appellate decision approving the denial of a motion for *voir dire* examination of the jury to ascertain whether any jurors had in fact seen the prejudicial publicity. The unanimity with which Federal trial judges throughout the land have made such inquiries even without express request once the existence of improper newspaper comment is made manifest demonstrates that, by the consensus of judicial opinion, a generalized admonition not to read about the case in the newspapers is deemed wholly insufficient once the prejudicial accounts have in fact appeared.

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3. In numerous other cases involving prejudicial newspaper publicity, the reports show that the trial judge in fact inquired whether the offending articles had been read by the jury. E.g., *United States v. Agueci,* 310 F. 2d 817, 831-832 (C. A. 2), certiorari denied, 872 U. S. 959; *Cohen v. United States,* 297 F. 2d 760, 763-764 (C. A. 9), certiorari denied, 369 U. S. 865; *United States v. LaBarbera,* 273 F. 2d 547 (C. A. 2); *United States v. Carruthers,* 152 F. 2d 512 (C. A. 7), certiorari denied, 327 U. S. 787; *Itow v. United States,* 223 Fed. 25, 28 (C. A. 9).

The present case, therefore, which takes a wholly different approach in a situation that recurs again and again, is in clear conflict with decisions of courts in other circuits and accordingly calls for further scrutiny here.

3. We mention, simply to show that it has not been overlooked, the suggestion of the court below that petitioner did not move for a change of venue. The short and indeed conclusive answer to this notion was given by the First Circuit in *Delaney v. United States,* 199 F. 2d 107, 116:

> "The right to apply for a change of venue is given for the defendant's benefit and at his option. He is not obliged to forego his constitutional right to an impartial trial in the district wherein the offense is alleged to have been committed."

Second. We think the judge's charge here, particularly the portion thereof given on the fourth day of the jury's deliberation (2262a-2263a; *supra,* pp. 9-10)—a portion, significantly enough, nowhere included in Appendix D to the opinion below (*infra,* pp. 17A-18A)—was improperly coercive within this Court's recent decision in *Jenkins v. United States,* 380 U. S. 445, reversing 330 F. 2d 220 (D. C. Cir.).

1. By way of preliminary, we note that the charge-as-a-whole doctrine, that venerable catch-all for sweeping under the judicial rug every inconvenient error committed at the trial, which the majority of the District of Columbia Circuit had relied on in the *Jenkins* case (330 F. 2d at 220-221), but to no avail, is subject to a logical difficulty, viz., that "We cannot speculate as to which part would be accepted by the jury * * *." *Price v. United States,* 200 F. 2d 652, 655 (C. A. 5).

Thus, here, the language that the court below deemed "not * * * desirable," because "it seems to us to place the Court in the position of urging a verdict with more empha-

sis than is appropriate," was considered cured by "the totality of the Judge's charge on reasonable doubt." But, to put the Fifth's Circuit language in the form of a question, "Which part would be accepted by the jury?"

2. Here the coercive aspect permeated the entire charge, and was moreover emphasized by being repeated after the jury had by over three days of deliberation demonstrated its inability to arrive at a verdict without coercion.

A. The trial judge early set up the hung jury as an ogre, and expressly—but quite improperly—told the jurors that a hung jury is discreditable to the individual jurors and to the jury, even to the extent of destroying the jury system (2179a, 2185a-2187a; *supra,* pp. 7-9). The law, of course, is quite otherwise; "a mistrial is as much a part of the jury system as a unanimous verdict." *Williams v. United States,* 338 F. 2d 530, 533 (C. A. D. C.).

Next, the trial judge told the jury, as to two essential elements of the offense, that they were not "an excuse not to make a verdict" (2184a) and "not something to hide behind to keep from making a verdict" (2192a). The trial judge encouraged compromise, approving "give and take" (2185a), and condemning firmness (2185a-2186a). Indeed, the trial judge said that a juror who remained steadfast was "not a good juror" and "not a good citizen" because "he doesn't understand the meaning of an oath" (2186a). Yet even the notorious *Allen* or "dynamite" charge (*Allen v. United States,* 164 U. S. 492, 501), which has yet to be condemned in its pristine form, constitutes reversible error when it fails to contain the qualification that if any individual juror still retains his views, he is not to yield his judgment simply because he is outnumbered. *United States v. Rogers,* 389 F. 2d 433, 434, 437 (C. A. 4); *Powell v. United States,* 297 F. 2d 318 (C. A. 5); *Green v. United States,* 307 F. 2d 852 (C. A. 5).

No such qualification was contained in the charge given here, before the jury retired (2179a, 2185a-2187a), yet the

court below held the charge cured by the trial court's abstractions concerning reasonable doubt.

B. But, bad as the charge was originally, its prejudicial content was compounded by the additional charge given after the jury had deliberated unsuccessfully for over three days. At that point, the trial court pressed hard for a verdict, calling attention to the lapse of time, and finally saying to the jury it did not need to examine all the evidence (2262a-2263a):

> "And I am going to ask you to resume your deliberations, taking into consideration that many of these counts in this indictment are very similar. It would seem that if a person were guilty or not guilty of one, the same thing would apply to many of the others."

Objection proved fruitless (2264a-2265a); the law that such a charge was improper was ignored (*Blunt v. United States,* 244 F. 2d 355, 367-368 (C. A. D. C.)); and the impact of the erroneous instruction was magnified because it came on the fourth day of the jury's deliberations. For, as this Court said in *Bollenbach v. United States,* 326 U. S. 607, 612:

> "Particularly in a criminal case, the trial judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge."

In context, therefore, the charge as supplemented was plainly and erroneously coercive. *Jenkins v. United States,* 380 U. S. 445.

Third. In this country a defendant must be given the benefit of a reasonable doubt. A reasonable doubt is "an excuse" to render a verdict of not guilty. The instruction given on reasonable doubt would prevent a jury from bringing a verdict of not guilty because they had a reasonable

doubt. And when the trial court stated "So that term reasonable doubt is used in the sense which I have undertaken here to define it to you," (*infra*, p. 18A), the petitioner was indeed gravely prejudiced. The court had stated to the jury that "It is very easy for a person in his own mind to say, 'Well, true, I have a reasonable doubt.'" (*infra*, p. 18A). If the evidence in a case is such that it is "very easy" for a juror to have a reasonable doubt there should be a verdict of not guilty. The district court instructed the jury that they should not "be confused by reasonable doubt." We submit the jury had to be confused.

Further, the instruction on reasonable doubt was fundamentally erroneous, since it reduced the content of the term to "such a doubt as would guide you in determining the course of action in the conduct of your everyday affairs." As such, it is obviously inconsistent with the philosophy expressed by this Court in *Holland v. United States*, 348 U. S. 121, 140; see also *United States v. Heap*, 345 F. 2d 170 (C. A. 2); *Scurry v. United States*, 347 F. 2d 468, 469-470 (C. A. D. C.).

With these words fresh in their ears, the jury retired and after a short interval returned the verdict of guilty against the petitioner.

Fourth. In *Ingram v. United States*, 360 U. S. 672, which, like the present appeal, involved a conviction for violating 18 U. S. C. § 371 by conspiring to evade the payment of the wagering tax, the Supreme Court said (360 U. S. at 678):

> "'[C]onspiracy to commit a particular substantive offense cannot exist without *at least* the degree of criminal intent necessary for the substantive offense itself.' [Footnote 9 omitted.] The substantive offense which Smith and Law were accused of conspiring to commit was the willful evasion of federal taxes, an offense which, even presuming knowledge of the tax law, obviously cannot be committed in the absence of

knowledge of willfulness. *Spies v. United States, supra. Cf. United States v. Falcone,* 311 U. S. 205."

The necessary result of the direction that "a person is presumed to intend the natural consequences of his own deliberate acts" was to create a presumption of specific intent inconsistent with the presumption of innocence. *Morissette v. United States,* 342 U. S. 246, 273. As there held, such a statement has no proper place in a charge relating to a criminal offense where specific intent and bad purpose are essential elements. Such instruction is condemned as fundamentally prejudicial. *Mann v. United States,* 319 F. 2d 404, 407, 410 (C. A. 5); *Chappell v. United States,* 270 F. 2d 274 (C. A. 9); *Block v. United States,* 221 F. 2d 786, 788-789 (C. A. 9).

And in his further instructions, given after the jury had requested clarification following deliberations for a day and a half, the trial judge not only failed to mention intent, but rejected the suggestion that he do so.

The heart of the supplementary instruction (2251a) was, "As I told you, it is a narrow proposition. Did they account for the tax or did they not," and the heart of the objection (2252a) was, "I think you leave them with the issue is (sic), did they fail to pay the taxes. It isn't only that but did they willfully and deliberately fail to do it."

Yet at this critical juncture, the court overruled the objection (2252a), and left the case to an obviously troubled jury as a problem in arithmetic, viz., whether the full 10% tax that the United States levies on gambling enterprises had been paid.

Since willfulness is an essential ingredient of the offense of conspiracy of which this petitioner was convicted, and since at a critical juncture of the proceedings the case was left with the jury under instructions that omitted all mention of willfulness, reversal for a new trial is required.

Fifth. The witness James Harris was sought to be impeached, in respect of his denial that his conversation

with this appellant had referred to the numbers business at the Copa Club, by means of an allegedly prior contradictory statement before the grand jury (1653a, 1655a-1656a). But in that statement, the appellant according to the witness had carefully differentiated between the Copa Club and the numbers business (1656a-1657a); the statement was therefore not contradictory.

When the answer was read again, the witness invoked privilege, and did so with respect to several other prior grand jury answers (1663a-1665a).

The resultant error is denounced by Wigmore and in two Circuits, because, in fact, it brings before the trial jury matter that is incompetent.

Wigmore says (3 *Evidence* (3d ed. 1940) § 1043):

> "It ought to follow that, where the witness *now* claims to be *unable to recollect* a matter, a former affirmation of it should be admitted as a contradiction. But Courts have usually forbidden this, because the improper effect is apt to be to give a testimonial value * * * to the former statement; its aspect as a mere contradiction being naturally overshadowed."

Accordingly, both the District of Columbia Circuit and the First Circuit have held it reversible error to attempt to contradict with prior testimony a witness who at the trial is unable to recall the transaction about which he is being questioned.

In *Young v. United States,* 214 F. 2d 232 (C. A. D. C.), it was held reversible error to read before the trial jury, on the theory of refreshing recollection, the witness' prior grand jury testimony (p. 237):

> "* * * Government counsel was permitted to read aloud much more of (the witness') grand jury testimony. This was not refreshing the witness' recollection. It was placing before the trial jury testimony previously given before a grand jury when there had

been no cross-examination and defendant was not confronted with the witnesses against him."

In *Westinghouse Electric Corp. v. Wray Equipment Corp.*, 286 F. 2d 491 (C. A. 1), similar use of a prior deposition, where of course the witness had been subject to cross-examination, was held error, the court saying (p. 493):

> "The cases are clear, however, that a deposition used in an attempt to refresh the witness' recollection is not itself admissible as evidence. * * * When a witness is unable to recall a past transaction, the majority of the cases do not allow a prior statement of the witness concerning that transaction to be introduced as a prior inconsistent statement."

And, after citing Wigmore, § 1043 (*supra*), the court added in a footnote, "Wigmore states that the basis of this exclusion is the possibility of improper testimonial effect being given to the prior statement. The instant case presents a forceful example of this danger" (286 F. 2d at 493, footnote 2).

Indeed, the case at bar shows an *a fortiori* situation. As Wigmore noted (§ 1043 at p. 737), there may well be situations where the witness' presently asserted lack of memory would be contradicted in fact by prior recent testimony showing an acute memory a little earlier. But when, as here, the witness invokes privilege, there is nothing whatever to be contradicted; the witness' invocation of his privilege does not contradict any testimony he gave earlier.

It is true that the court here admonished the jury that the subject matter of the questions, which set forth the witness' grand jury answers, were not to be taken as evidence against the defendants (1662a, 1665a). But that is a distinction too delicate for lay jurors. In the words of Mr. Justice Cardozo, speaking for the Court in *Shepard v. United States*, 290 U. S. 96, 104:

> "Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds."

For, as has already been indicated, in this close case, where the jury deliberated for almost four days and yet found petitioner guilty on only one out of 33 counts, it was especially prejudicial that Harris' grand jury testimony should be improperly read to the triers of fact by the prosecutor. *Namet v. United States,* 373 U. S. 179, 187; *Douglas v. Alabama,* 380 U. S. 415.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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September 1965.

APPENDIX A.

Constitutional Provisions and Statutes Involved.

The Fifth Amendment provides in pertinent part:

> * * * nor shall any person * * * be deprived of life, liberty, or property, without due process of law * * *

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *

18 U. S. C. 371 provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> * * *

Section 7201 of the Internal Revenue Code of 1954, 26 U. S. C. 7201, provides in pertinent part:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony * * *

Section 7201 of the Internal Revenue Code of 1954, 26 U. S. C. 7206, provides in pertinent part:

> Any person who—

(1) *Declaration under penalties of perjury.*—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) *Aid or assistance.*—Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document;

* * *

shall be guilty of a felony * * *

Section 4401 of the Internal Revenue Code of 1954, 26 U. S. C. 4401, provides in pertinent part:

* * *

(c) Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him. (As amended Sept. 2, 1958, Pub. L. 85-859, Title I, § 151(a), 72 Stat. 1304.)

APPENDIX B.

Opinion Below.

No. 15623

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *v.* FRANK J. ANDREWS, WALTER OWENS, PETER A. ANDREWS, JR., WILLARD WHITLEY, GUS POSTELL, LOUIS TYE, FRANK D. ANDRIOLA, RUSSELL A. MALONE, *Defendants-Appellants.*	APPEALS from the United States District Court for the Eastern District of Kentucky at Covington.

Decided June 17, 1965.

Before: MILLER, CECIL and EDWARDS, *Circuit Judges.*

EDWARDS, *Circuit Judge.* These appeals are from convictions for conspiracy to violate, and specific violations of the Internal Revenue Statutes by fraudulently concealing and withholding gambling excise taxes.

The first count of the indictments was a conspiracy count and the balance of the counts, 2 through 32, consist of the substantive counts of willful understatement of or failure to pay the excise taxes. Count 33 charged violation of the Federal Communications Act, and Counts 34 and 35 charged willful failure to register and pay the wagering occupational tax.

Defendant Frank J. Andrews was found guilty on Count 1 and received a sentence of five years and $10,000 fine. Defendant Daniel Andrews was severed because of his illness. The other seven defendants were found guilty on Count 1 and on a variety of the substantive counts. They were sentenced to terms of five years on each count for which they were convicted, except that Peter A. Andrews and Russell A. Malone were sentenced to only one year for their convictions on Counts 34 and 35. All seven were also fined $10,000 for conviction on Count 1. All of the sentences were made to run concurrently.

This trial was a sequel to large-scale,[1] illegal but wide open gambling operations in Newport, Kentucky. This record clearly establishes the nature and extent of the gambling. Indeed, no defendant, other than Frank Andrews, takes the trouble to deny being in the "business" of gambling during the time concerned. All do deny conspiring to evade federal wagering taxes and the substantive offenses charged.

Each of the several briefs filed on behalf of defendants argues the insufficiency of the evidence to support the verdicts and in this regard relies upon the applicable law as set forth in *Ingram v. United States,* 360 U. S. 672 (1959). In that case the United States Supreme Court affirmed convictions as to defendants Ingram and Jenkins (described as "entrepreneurs") and reversed as to defendants Smith and Law (described as "relatively minor clerical functionaries").

The Court's distinctions as set forth in the majority opinion of Mr. Justice Stewart thus:

> "But the evidence of agreement between Ingram and Jenkins to operate this gambling enterprise, which operation made them liable for federal taxes, and to conceal its operation and its income is clear on this

1. Computations of government evidence indicate total wagers during the times concerned of over five million dollars and a total tax evasion of over four hundred thousand dollars.

record, and is virtually conceded by the petitioners. The evidence was sufficient to support a conclusion that they were engaged not only in a conspiracy to operate and conceal their gambling enterprise, but that they were also parties to an agreement to attempt to defeat or evade the federal taxes imposed upon the operators of such a business.

"As to Smith and Law, the case is quite a different one. While the record clearly supports a finding that Smith and Law were participants in a conspiracy to operate a lottery and to conceal that operation from local law enforcement agencies, we find no warrant for a finding that they were, like Ingram and Jenkins, parties to a conspiracy with a purpose illegal under federal law. Certainly there is nothing in the record to show that Smith and Law knew that Ingram and Jenkins had not paid the taxes, a fact obviously within the knowledge of the latter. . . ." *Ingram v. United States, supra* at 677.

Thus, we take it, convictions for conspiracy to evade federal gambling tax laws cannot be sustained absent proof 1) that defendants were parties to an agreement to defeat or evade the taxes, or 2) that defendants had knowledge that the taxes were due and were not being paid, plus conduct in furtherance of a plan to evade them.

We regard this record as establishing beyond all peradventure of a doubt at least two substantial, deliberate and interrelated schemes for large-scale federal tax evasion. The first such scheme relates to a method for reporting approximately one-quarter of the taxes actually due on the "day" numbers game and other related gambling activities. As testified to by Ruth Jane Siuda, one of the six girls who "ran the work" on the "day" numbers, it was her job after the totalling of the work and after the hits had been determined to "pull the work." Her testimony leaves no doubt that this meant extracting the most convenient one-quarter

of the bet slips so as to show a total take of $1,500-$2,000 per day, whereas in fact the daily total on this operation was $8,500. (See Appendix A.) The federal tax returns show clearly that taxes were paid only on the work thus "pulled."

The second major scheme for tax evasion involved the operation of a "night" numbers game. The record clearly establishes that no taxes were paid on this game at all, and it is argued to us that we should read the record as establishing that this game was within the exception to the wagering tax statute. Int. Rev. Code of 1954, § 4421(2)A.

The evidence, however, is overwhelmingly to the contrary, as obviously the jury found. It is patent that many of the persons participating in the "night" numbers operation were not on the premises at the time of the declaration of the winners and that the fact situation here involved large-scale telephone bet procedures, as well as the writing of bets off the premises.

As to Walter Owens, Willard Whitley, Peter Andrews, Jr., and Gus Postell, there can be no doubt about their status as entrepreneurs in relation to one or the other of the two major tax evasion schemes which we have referred to above. The records of the gambling partnerships, the tax return forms, and the testimony of Internal Revenue Supervisor William R. Tabb, and Agent Robert L. Thomas is ample to establish this.

We believe that the testimony of the Revenue Agents, plus Government Exhibit 305 (See Appendix B) is sufficient evidence from which the jury could have found Louis Tye and Frank ("Bud") Andriola guilty on the conspiracy count as entrepreneurs likewise. Furthermore, their was testimony by a government handwriting expert that Exhibit 305 was in the handwriting of defendant Frank J. Andrews. (See Appendix C.)

As to Russell A. Malone, the testimony clearly indicates his role in advertising that no taxes were paid on the "night" numbers game, while at the same time assuring

bettors that they did not in fact have to be present to win. Hence, his conviction on the conspiracy count seems warranted by the evidence herein. We regard it as consistent with the second of the two evidentiary standards set forth by Justice Stewart in the *Ingram* case.

As to defendant Frank J. Andrews, the evidentiary situation relating to Count 1 is quite different. He was admittedly owner of "The Sportsman's Club" wherein these wide open gambling operations were conducted. It is his contention that his relationship to the club was entirely that of owner of the building and the landlord of those defendants who rented the premises. There is, however, strong circumstantial evidence that defendant Frank J. Andrews was more than a landlord. The unconcealed nature of the gambling operations conducted at his Sportsman's Club, his presence on the first day of the "consolidated operation" of the numbers business, his ordering the installation of the burglar alarm system at the new Sportsman's Club, his visits to the bookkeeping room where the girls "ran the work," the testimony which indicates that it was he who dealt with the competitive threat of Junior Andrews' location, the fact that he hired one of the telephone operators for the "night" numbers game, and the fact that substantial sums were paid out of the "day" numbers proceeds for taxes or rental owed by defendant Frank J. Andrews personally all represent facts from which this jury could have inferred that defendant Frank Andrews had an entrepreneurial relationship to the gambling operation at the Sportsman's Club and knowledge of the two schemes for tax evasion which we have previously described.

Perhaps the most significant bit of evidence pertaining to Frank Andrews' knowledge and participation in the "day" numbers tax evasion scheme is the testimony which clearly establishes that Frank Andrews paid for construction of a hidden closet at the Sportsman's Club. This closet, controlled by an electrical attachment which "could be

opened by touching two nails," was discovered at the time of the August 1961 raid. It contained the "pulled" and "bundled" work for July 1961. Testimony indicated that such "bundles" amounted to less than one-fourth of the total wagers. But the total of the "bundled" work found in the secret closet corresponded exactly with the amount of wagers reported for tax purposes for the month of July 1961.

In addition, testimony showed deposits of $103,000 in defendant Frank Andrews' bank account between October of 1960 and August of 1961. Many of these deposits to Andrews' account were made by an agent of the "day" numbers gambling partnership and over 100 of the checks deposited had symbols on them which were identified as the symbols of various numbers writers.

In short, we believe that the evidence of a substantial conspiracy to evade and defeat the payment of federal wagering taxes was overwhelming and that there was ample evidence to support the jury findings of guilty as to the conspiracy count of the indictment as to all of the defendants in this case within the rule of *Ingram v. United States, supra.*

As to the substantive counts, we do not contemplate such detail. Again, the proofs of willful evasion of taxes offered by the government to support the various counts was overwhelming and uncontroverted.

The meticulous care with which the jury dealt with the individual indictments in this trial is demonstrated by the highly specific verdicts which were returned:

> "We the jury find the defendants as named.
>
> "Frank J. Andrews Guilty on Count 1—undecided on counts 2 thru 33.
>
> "Walter Owens guilty on counts 1 thru 33.
>
> "Peter A. Andrews, Jr., guilty on counts 1 thru 29 and 33-34-35.
>
> "Willard Whitley guilty on counts 1 thru 33.

"Gus Postell guilty on counts 1 thru 15 and 33. Not guilty on 16 thru 32.

"Louis Tye guilty on counts 1 thru 33.

"Frank Andriola guilty on counts 1 thru 9 and 33.

"Russell Malone guilty on counts 1 and 34, 35.

"MELVIN HART, Foreman."

We have read the record and believe that there is ample proof to support the verdicts just recited.

The other important issue argued in this case pertains to the complaint, particularly by defendant Frank Andrews that pretrial and during trial publicity deprived him of due process of law and a fair and impartial jury trial.

This court has dealt recently and extensively with due process violation claims asserted to have been caused by press media prior to and during a criminal trial. *Sheppard v. Maxwell,* — F. 2d — (C. A. 6, 1965). Decided May 5, 1965.

It is certain that defendant's claim as to publicity do not begin to approach in quantity or possible prejudicial impact those asserted and rejected by the majority opinion in *Sheppard.*

As to the standards set in the dissenting opinion, the distinctions between the publicity impact upon this trial as compared to the Sheppard trial are numerous and important.

This was not a capital case.

There is no indication of public shock in this community over the crime of federal tax evasion being charged. This community had indeed been quite tolerant of defendant's "business."

It should particularly be noted in this regard that defendants never moved for a change of venue.

The trial judge was not a candidate for an immediately forthcoming judicial election; and certainly no one could say from this record that the press was ever allowed to

become "the dominant factor" in Judge Swinford's courtroom.

The admonitions to the jury not to read the newspapers or listen to radio or TV were in unmistakable language and repeated at every adjournment. See *Coppedge v. United States,* 272 F. 2d 504 (C. A. D. C., 1959); *Estes v. United States,* 335 F. 2d 609 (C. A. 5, 1964), *cert. denied,* 379 U. S. 964 (1965).

The press comment on the trial, although frequently played on page one, was generally concerned with reporting what went into the trial record. The variances which were called to our attention do not in our judgment represent the "deliberate and highly prejudicial supplementation of the trial record" which was referred to in the dissenting opinion in Sheppard. See *Sheppard v. Maxwell, supra at —.*

This record does not disclose extrajudicial contacts with and communications to this jury.

Finally, we have every reason to believe that the jury verdict in this trial was a "verdict . . . based upon the evidence developed at the trial." *Turner v. Louisiana,* 379 U. S. 466, 472 (1965).

While appellants rely upon *Briggs v. United States,* 221 F. 2d 636 (C. A. 6, 1955); *Marson v. United States,* 203 F. 2d 904 (C. A. 6, 1953), and *Stone v. United States,* 113 F. 2d 70 (C. A. 6, 1940), we find the factual distinctions between this case and those relied on to be both significant and determinative. The facts in this case pertaining to claimed prejudicial publicity are directly comparable to those in *Estes v. United States, supra.*

We also believe that the trial judge committed no error in denying the motion to suppress the evidence seized in this case. Rule 41 of the Federal Rules of Criminal Procedure recites in part:

> "The warrant shall be directed to a civil officer of thes United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized

by the President of the United States. . . ." Rule 41(c) Fed. R. Crim. P.

We have no doubt that the Internal Revenue Agents who served these warants were properly designated under the terms of this rule. *United States v. Sigal,* 341 F. 2d 837 (C. A. 3, 1965); *United States v. Pasha,* 332 F. 2d 193 (C. A. 7, 1964), *Cert. denied,* — U. S. — (1965).

Further, we find no prejudicial error in Judge Swinword's charge when its language is taken as a whole and construed in context.

In this otherwise appropriate charge, however, the trial judge used two sentences which concern us. Referring to reasonable doubt he said: "It is not an excuse not to make a verdict. It is not a shield to hide behind to keep from carrying out your responsibility as a juror." We do not believe that this language is desirable. While it may be argued that this simply tells the jury that it is not any captious doubt which should cause them to withhold a verdict if otherwise convinced, it seems to us to place the Court in the position of urging a verdict with more emphasis than is appropriate.

These words also, however, must be viewed in relation to the totality of the Judge's charge on reasonable doubt. (See Appendix D.) Taken as a whole we believe that defendants suffered no prejudice therefrom.

In this regard and in relation to the numerous other issues presented by appellants which we have reviewed, we find no reversible error. Rule 52(a) Fed. R. Crim. P.; 28 U. S. C. § 2111.

Affirmed.

APPENDIX A.

(Testimony of plaintiff-appellee's witness Ruth Jane Siuda)

"Q. (By Mr. Lynch) How did that bundle come to be made?

"A. After we ran the work, the overlooks were pulled out of it, this, then I bundled the work.

"Q. Now, by 'bundled the work' what do you mean that you would do?

"A. Pull these books out of it and put a rubberband around it.

"Q. You would pull the books out?

"A. Yes.

"Q. By that you mean you would pull certain work out?

"A. Yes.

"Q. And how would the work ordinarily be placed, the work from which you would pull these books?

"A. It was all in boxes.

"Q. How many boxes for a day's work?

"A. Three.

"Q. Now, after you—observing the, this particular bundle dated 7/28/61, did you make the tape on that?

"A. Yes, I did.

"Q. How would you know which bundles to pull?

"A. Well, it was usually the same work all the time.

"Q. Well, would you have a particular figure or amount that you would pull?

"A. From 18 to $2,000.

"Q. And in addition to this work that you would pull in, the $18,000 to $2,000 that is a high figure, is that right? In other words, you would pull out a bundle that 18 would equal an $18 to $2,000 high?

"A. Yes.

"Q. What would be done with the other work?

"A. We would keep it three days and then put it in a box.

"Q. And what would happen to it after you put it in a box?

"A. I don't know what happened to it.

"Q. Well, what would you do with it?

"A. I wouldn't do anything with it, just put the work in the box.

"Q. Would you put the box in a particular place?

"A. Just left it in the office.

"Q. And when you came there the next morning would the box be there?

"A. No.

"Q. And the work that you put in this box after three days, the work that hadn't been pulled and bundled, were those the yellow bet slips?

"A. Yes.

"Q. Were those white sheets of paper the telephone work?

"A. Yes.

"Q. Now, do you know what proportion of the work that you would pull and bundle, what proportion that represented to the entire work for that particular day?

"A. Each day ran differently but I would say about a quarter of it.

* * *

"Q. Well, after you did this bundling operation from the previous day's work, how much work would remain after that?

"A. Oh, three-fourths of it.

"Q. And how many boxes similar to boxes such as are shown in government exhibit 199, would the remaining unbundled work fill?

"A. I don't know that it filled it but there would be two boxes.

* * *

"Q. Now, who would be the people who would go through the work and look for the hits?

"A. Who?

"Q. Who?

"A. All of us did it.

"Q. All of who?

"A. All the girls in the office.

"Q. Anyone else?

"A. We had about three girls, four girls come in.

"Q. Anyone else?

"A. Mr. Whitley, sometime.

"Q. Anyone else?

"A. Mr. Postell, sometimes.

"Q. Anyone else?

"A. No.

"Q. Now, after you went through and got the hits for each of the books, you would pull the tickets, mark them, somebody would compute the amounts of hits, is that correct?

"A. That's right.

* * *

"The Court: What was the total amount of money taken in by the house on the day numbers?

* * *

"The Court: Well, I mean from the time charged in this indictment, I don't think that is too material, but we will put it that way.

"Mr. Lynch: From the time she was in the Old Sportsman's Club Your Honor, that would cover it.

"The Court: From the time you were in the Old Sportsman's Club. Can you give me that? If you can't just say you can't.

"The Witness: I would say roughly about, roughly about $8500.00.

"The Court: Roughly $8500.00?

"The Witness: (Nods)."

APPENDIX B

(Testimony of Sidney William Macauley, Special Agent, Intelligence Division, Internal Revenue Service.)

"Q. (By Mr. Lynch) Now, turning to page 47 of this ledger, can you tell us what the figures are and will you demonstrate it on this machine and where the figures are obtained from?

* * *

"A. (Continuing) This page 47 in the journal is dated July 2nd. The expense column—your income column. This is the expense column. This is the difference. Now, let's look at these figures here. Remember I went back a few pages, I went back five pages and the figure was $885 and some cents. The next page, the difference between expenses and income was $409 and then I read aloud the postings from the other pages, $1269, $1222, and this figure $2415.68 is shown here as $2415. If you were to add these five weeks figures, you would arrive at $6300. If you take 50% of it, divide it in half, half of $6300 is $3150. There is a small word here, which I don't know if you can read it, but it says 'house.' We have '10% Bud,' 10% of $3150 is $315, shown here. You subtract $3150 and $315 from $6300, you arrive at $2835, and it is marked over here, 'Junior and Louis.'

"If you divide the remainder, 2835, in half, you get $1417.50, Louis; $1417.50, Junior. . . ."

GOVERNMENT EXHIBIT No. 305

47

		July 2		2415.68
Jr. and Tye	300.00	Bar		1784.15
Band	700.00	Craps		1005.00
Buddy	75.00	Ex Craps		490.00
Duck	30.00	Door		481.50
Andrews	41.00	Booker		33.75
Perry	21.00	Beat Dealers		33.20
Tom	50.00	Nigh Roll		968.00
Pitt	50.00			4795.60
Ex Porter	25.00			
Lot man	20.00			
C. Johnson	25.00			
Worthy	15.00	2415.00		
D. Henny	130.00	1222.00		
RLD	54.00	1269.00		
Whisky	344.77	509.00		
Bar	307.25	885.00		
Coca Cola	26.40			
W. T. Wagner	9.10	6300.00		
New Way	31.51	3150.00	House	
10% Tax	109.49	315.00	10% Bud	
Fruit Products	15.40	2835.00	Jr. Lewis	
		1417.50	Lewis	
	2379.92	1417.50	Jr.	

APPENDIX C.

(Testimony of plaintiff-appellee's witness Edwin C. Schroeder)

"Q. (By Mr. Lynch) Showing you Government Exhibit 305, which is a ledger, referring you to page 47, of that ledger, and specifically to that portion of the page which has a series of figures on the righthand side with notations, '315 house, 315 10% Bud, Junior, Louis, Louis and Junior,' have you seen and made an examination of that?

"A. Yes.

"Q. Now, have you arrived at an opinion as to whether Government Exhibit 314, the slip with the 'Frank J. Andrews, O.K.', Government Exhibit 210-A the spiral notebook, the first page of the spiral notebook; and Government Exhibit 305, page 47 and the listings, the figures, the notations thereon, were written by the same person who wrote the signature cards which are Government Exhibit 237, signed by Frank J. Andrews, the American District Telegraph contract, which is Government Exhibit 299, and the checks, forming Government Exhibit 301?

"A. I have an opinion.

"Q. What is that opinion?

"A. It is my opinion that the writer of the various standard documents signed Frank J. Andrews is the author of the notations in the ledger, the lower right half, and the small slip of paper and the notations in the spiral notebook."

APPENDIX D.

"In the first place, these defendants, and each of them, are presumed to be innocent until their guilt is established to your satisfaction to the exclusion of a reasonable doubt. That presumption of innocence starts with them at the beginning of the case and remains with them throughout the trial, and must be overcome by evidence, before you can accept as evidence as establishing their guilt. You must start with the presumption that these defendants,

and each of them, are innocent until their guilt is established to your satisfaction, as I say, to the exclusion of a reasonable doubt.

"The term reasonable doubt, as used in this instruction, is best defined by a use of the term itself. Don't be confused by reasonable doubt. It is not an excuse not to make a verdict. It is not a shield to hide behind to keep from carrying out your responsibility as a juror. It is very easy for a person in his own mind to say, "Well, true, I have a reasonable doubt." Well, that is a rather variable thing, what is reasonable and what is unreasonable. But I think as common sense men of everyday affairs, you do understand the difference between what is reasonable and what is unreasonable, and so this term reasonable doubt means just what it says. It is a doubt based upon reason, not some inconsequential doubt that might flit through the mind of a juror, not some slight mental hesitation that might guide you in determining the less significant affairs of everyday life; but a doubt for which there is reason, such a doubt as would guide you in determining the course of action in the conduct of your ordinary everyday living; a doubt based upon reason, not some shadowy, inconsequential misgiving.

"Few things are capable of proof to absolute certainty and while it is required of the law that the United States should establish its case to the exclusion of a reasonable doubt, it does not mean that the United States should prove its case beyond all doubt. And if it were so required, it would be practically impossible for the United States to successfully carry out the prosecution of the laws. So that term reasonable doubt is used in the sense which I have undertaken here to define it to you.

"Now, your verdict must be unanimous. You are not to arrive at a verdict by casting lots, by holding a primary election, by drawing straws, but your verdict must be unanimous. It must be the verdict of each juror. Each juror must make up his mind what the verdict should be. . . ."

APPENDIX C.

Judgment.

Filed
June 17, 1965
Carl W. Reuss, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

No. 15,623.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FRANK J. ANDREWS, ET AL.,
Defendants-Appellants.

Before: MILLER, CECIL and EDWARDS, *Circuit Judges.*

JUDGMENT.

APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Entered by order of the Court.

CARL W. REUSS,
Clerk.

APPENDIX D.

Order Sur Petition for Rehearing.

Filed
August 30, 1965
Carl W. Reuss, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

No. 15,623.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FRANK J. ANDREWS, ET AL.,
Defendants-Appellants.

ORDER.

Before: MILLER, CECIL and EDWARDS, *Circuit Judges.*

Petitions for rehearing having been received and considered by the court in the above-styled appeal,

IT IS HEREBY ORDERED that said petitions be DENIED.

Entered by order of the court:

/s/ CARL W. REUSS,
Clerk.